On May 19, 1891, you refused Swisher's application for the reinstatement of Milliken's entry, and returned McMurtry's application for allowance. From that judgment Swisher appeals to this Department, claiming confirmation of entry under the act of 1891 (*supra*).

While Milliken's entry was based upon a second filing, and thus contrary to the provisions of section 2261 of the Revised Statutes, and invalid at the time made, yet there is nothing in the record which shows that the transferees had any knowledge of that invalidity. The entryman's sale to Williams, and also that of Williams to Swisher, were made before March 1, 1888. No adverse claim originated prior to final entry; a valuable consideration was paid for the land, and there is nothing in the record impeaching the bona fides of the purchasers, and no fraud is charged against them. The application to reinstate the entry was made within three days after your order of cancellation, and five days before McMurtry presented his homestead application.

All the conditions exist upon which confirmation is authorized by the 7th section of the act of 1891 (*supra*). George De Shane *et al.*, 12 L. D., 637.

You will therefore adjudicate the case, in accordance with said act and the instructions thereunder (12 L. D., 450).

The decision appealed from is accordingly reversed.

STONE LAND—AGRICULTURAL ENTRY.

HAYDEN *v.* JAMISON.

Land containing ordinary building stone is not excluded thereby from agricultural entry, though more valuable as a quarry than for agricultural purposes.

A homestead entry embracing land of such character is not of necessity made in bad faith, though made for the purpose of securing the stone, and may be perfected, provided the entryman makes his actual home on the land, improves the same, and shows some agricultural use thereof.

Secretary Smith to the Commissioner of the General Land Office, June 21, 1893.

Thomas Jamison has filed a petition for re-review of the case of Jamison *v.* Hayden (15 L. D., 276), sustained on review March 7, 1893. This petition is filed under the rule in Neff *v.* Cowhick, 8 L. D., 111.

Several grounds of error are alleged, the most material of which are that the original motion was for a rehearing, as well as review, and that only the review side of the motion was considered in the decision of March 7, 1893, and that a hearing as to the character of the land entered was had when that question was not properly in issue, and that Jamison has therefore not had his day in court upon that question.

It is also alleged that the facts brought out at such hearing did not justify the finding of bad faith upon the part of the homestead entryman.

A motion to strike out the petition for re-review has been filed by counsel for Hayden, upon the ground that all matters there alleged were passed upon in the first review decision.

I have carefully examined the record in the several proceedings in this case, and am of the opinion that error has been committed by the Department in its rulings; and, in the exercise of the supervisory jurisdiction vested in this Department, I consider it my duty when a substantial error is found to correct it, without regard to the means through which it was discovered.

The facts as presented by the record before me are as follows:

September 24, 1889, Jamison made homestead entry for the SW. ¼ of Sec. 6, T. 3 N., R. 70 W., Denver, Colorado.

Some time prior thereto, date not given, Hayden and members of his family had made placer mining locations upon all but forty acres of the tract, and, on January 10, 1890, Benjamin F. Hayden offered to file his mineral application for the land so located. His application was refused, on account of Jamison's entry. He then withdrew his application, and filed a contest against said entry, alleging that the land was more valuable for mining than agricultural purposes; that it was not settled upon and cultivated as required by law, and that the entry was made after there was a placer mining location made on the same, and that the said land was opened up in several places for stone-quarrying purposes disclosing building and flagging stones—all of which was known to Jamison at the time he made his entry.

Hearing was ordered, and on June 13, 1890, the local officers held that they had no jurisdiction over the case, because "There is nothing on file in this office to show that the contestant is entitled to consideration as a mineral claimant, proof of posting, certificate of location, etc., being absent."

They dismissed the contest.

Hayden appealed, and your predecessor reversed the action of the local office, and finding from the evidence that the land was more valuable for its minerals than for agriculture, held the homestead entry of Jamison for cancellation.

On appeal, this Department by the decision now sought to be reviewed found that the land was of little or no value for agricultural purposes, and that Jamison made his homestead entry for the sole purpose of securing the stone quarries thereon, and for that reason his homestead entry could not be considered as made in good faith.

From the testimony submitted at the hearing the land would appear to be of little value for farming purposes, but it is insisted by counsel for Jamison that the question as to the relative value of the land for mineral or agricultural purposes was not in issue at the hearing, because it is only when the contest is between a mineral and agricultural claimant that such relative value becomes material, and that Hayden having withdrawn his mineral application prior to bringing his contest, can

not be regarded as a claimant for the land, but only as a mere protestant, and as such could only be allowed to show non-compliance with the requirements of the homestead law on the part of Jamison, which having failed to do, his contest was properly dismissed by the local officers.

I do not care to discuss this question of practice, as I do not consider it necessary from the view I take of the law.

The testimony has been examined, and shows that the tract consists almost wholly of ledges of red sandstone, useful only for building purposes, in which is included paving and flagging. No other mineral substance is shown to exist on the entry.

The later rulings of this Department hold that the existence of such rock does not except the land from agricultural entry, even though it is much more valuable for quarrying than for agricultural purposes. Clark *et al v.* Ervin, 16 L. D., 122; Conlin *v.* Kelly, 12 L. D., 1; see also McGlenn, *v.* Wienbroeer, 15 L. D., 370. In the last case the stone was useful for many purposes other than building, and the mineral entry was allowed. Until the act of August 4, 1892, there was no statute allowing such lands to be entered under any of the mining laws.

Although your office, in the case of H. P. Benet, Jr., 3 L. D., 116, held that land chiefly valuable for building stone may be entered as a placer claim, that case was substantially overruled in the case of Conlin *v.* Kelly, *supra*, and I have not found any reported decision of this Department holding that such land could not be entered under the laws relating to agricultural entries. In fact, the instructions relative to the act of August 4, 1892, expressly state that *such act* does not "withdraw land chiefly valuable for building stone from entry under any existing law applicable thereto." (15 L. D., 360.)

Such land being subject to agricultural entry only, even if it should appear that Jamison's entry was made for the purpose of securing the stone quarries, it would not necessarily follow that it was made in bad faith, provided he complied with the homestead law as to residence, improvements, etc. No reason is perceived why he might not make a home for himself and family on land the chief revenue from which is building stone, rather than agricultural products.

I know of no statute, or regulation of this Department, requiring a homesteader to support himself and family solely from the agricultural products of his farm. Such a ruing would exclude from the benefits of the homestead laws all those who followed other pursuits than farming for a livelihood.

Whether land of this character, incapable of producing any agricultural crop and unfit even for grazing, would be subject to homestead entry need not be here discussed, further than to say that the entryman in his final proof would be required to show some cultivation of the land, or that it was used for grazing purposes. It was not necessary for Jamison to show at the hearing that he had cultivated the

land, for his entry was not made until September, 1889, and the hearing was had before the cropping season of the next year.

While I find from the evidence now before me that this land is chiefly valuable for building stone, I am not satisfied that it is entirely incapable of cultivation and unfit for grazing, and, as Jamison claims that he can produce evidence of its agricultural qualities, and that he failed to do so at the hearing because he understood that question not to be in issue, I think justice will be best subserved by giving him an opportunity to do so now.

I am further persuaded that this is the proper course to pursue by a letter in the record before me from the contestant, of date February 15, 1892, stating that the land embraced in the entry is very valuable ($300,000), that it contains, besides building stone, large deposits of fire-clay, limestone, marble and gypsum, and asking that he be allowed to prove this, if the placer claim can not be sustained.

If these minerals are found in paying quantities upon the land, it is subject to entry under the mining laws, as construed by this Department, and that fact, if proven, may very materially affect the rights of the agricultural claimant.

You will therefore reinstate the homestead entry of Jamison, and direct a hearing as to the character of the land, its capacity for agriculture, and the nature, value and extent of all deposits of a stone or mineral character found thereon, and re-adjudicate the question in the light of the evidence thus obtained.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

CLEMENT *v.* CLEMENT ET AL.

The confirmatory provisions of section 7, act of March 3, 1891, for the benefit of *bona fide* incumbrancers, extend to a homestead entry made by one who had previously secured title to another tract under the homestead law.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 21, 1893.

I have considered the motion filed by Lydia A. Penrose, mortgagee, to remand to you the case of Joseph S. Clement *v.* James W. Clement and Lydia A. Penrose, mortgagee, involving homestead entry No. 11,978, commuted to cash entry No. 7618, of the NW. ¼ of Sec. 9, T. 113 N., R. 58, Watertown, Dakota, in order that you may dismiss the contest against said entry, and approve the same for patent under the provisions of section 7 of the act of Congress approved March 3, 1891 (26 Stat., 1095).

The grounds of said motion are that when final certificate and receipt issued in said case, on March 25, 1835, no protest or contest was filed against the validity of said entry, and not until July 3, 1887, which was more than two years after said entry was allowed; that said land was mortgaged to said Penrose, who in good faith loaned said entry-